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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/696,284	10/29/2003	Ahmad Akashe	77017	6489

22242 7590 10/01/2004

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EXAMINER	
WEIER, ANTHONY J	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 10/01/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/696,284	AKASHE ET AL.	
	Examiner	Art Unit	
	Anthony Weier	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *07 September 2004*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-20* is/are pending in the application.

4a) Of the above claim(s) *1-10* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *11-20* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Applicant's election without traverse of Group II in the reply filed on 9/7/04 is acknowledged.

Double Patenting

2. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

3. Claims 11-20 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 12-28 of copending Application No. 10/655478. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant claims call for the preparation of a fermented soy-containing product wherein the deflavored soy protein material is fermented. The claims of 10/655478 refer to the preparation of beverages including smoothies. These claims do not call for a fermenting step in preparation of the beverage, but they also do not exclude same. Smoothies and other similar products such as shakes are known to include yogurt ingredients. As such, it would have been

obvious to one having ordinary skill in the art at the time of the invention to have modified the invention of the claims of 10/655478 to include the fermentation and inclusion of yogurt as an art recognized ingredient in at least thick beverages such as smoothies or shakes.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

4. Claims 11-20 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-22 of copending Application No. 10/655259. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant claims call for steps of creating a fermented soy product. Although the claims of 10/655259 stop short of same and are primarily directed to creation of the soy protein component, it is well known to ferment soybean protein to form yogurt. Therefore, it would have been obvious to one having ordinary skill in the art at the time of the invention to have added the steps of creating yogurt through fermentation as an art recognized use of soy protein and as a matter of preference.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

5. Claims 11-20 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-8 and 10-28 of U.S. Patent No. 6787173. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of U.S. Patent No. 6787173 further include

steps directed to recycling and further recovery of elements and the instant claims call for the preparation of a fermented soy product. However, it would have been obvious to one having ordinary skill in the art at the time of the invention to have removed the recycling and recovery steps to provide for an, albeit, less efficient, process. In addition, In addition, it is well known to use soy protein in creating a fermented soy product (e.g. yogurt), and it would have been further obvious to have fermented the soy protein of U.S. Patent No. 6787173 to effect a soy yogurt product as an art recognized alternative use for soy protein.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

6. Claims 11-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Goodnight, Jr. et al (U.S. Patent No. 4091,120) taken together with Cole et al.

Goodnight, Jr. et al discloses preparation of a soybean slurry from soy flour wherein the concentration of soybean is as called for in the claims and wherein the pH of the slurry is adjusted as set forth in the instant claims and the resulting slurry is passed through an ultrafiltration membrane, inherently polymeric, having a cutoff and employing the processing temperature as claimed . The soy protein created therein is inherently deflavored taking into account the similarity in processing between the instant invention and that of Goodnight, Jr. et al (see cols. 2-4; examples).

The claims differ in that the soy protein is then fermented to create a yogurt product. However, it is well known to include soy protein in the preparation of yogurt as taught, for example, by Cole et al. It would have been obvious to one having ordinary skill in the art at the time of the invention to have included soybean protein of Goodnight, Jr. et al in yogurt as a well known alternative use of soy protein.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony Weier whose telephone number is 571-272-1409. The examiner can normally be reached on Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Anthony Weier
Primary Examiner

Anthony Weier
September 27, 2004

Art Unit 1761